A **TAN SRI DATO' SERI VINCENT TAN CHEE YIOUN & ANOR v. JAN DE NUL (MALAYSIA) SDN BHD & ANOR AND ANOTHER APPEAL**

FEDERAL COURT, PUTRAJAYA
RAMLY ALI FCJ
B AZAHAR MOHAMED FCJ
ROHANA YUSUF FCJ
MOHD ZAWAWI SALLEH FCJ
ABANG ISKANDAR JCA
[CIVIL APPEALS NO: 02(f)-8-02-2018(W) & 02(f)-7-02-2018(W)]
C 31 OCTOBER 2018

ARBITRATION: *International arbitration – Dispute – Dispute involving Malaysian company held by foreign party – Whether arbitration between parties was international arbitration – Whether parties had to 'opt in' in writing –*
D *Whether foreign party was only nominal party – Whether parties entitled to file reference on questions of law within meaning of s. 2 of Arbitration Act 2005 ('Act') – Whether Act or Malaysian law recognises 'domestic international arbitration' – Whether s. 42 of Act automatically applies to arbitration governed by laws of Malaysia notwithstanding that one or more parties to arbitration may be foreign*

E ***ARBITRATION:*** *International arbitration – Domestic international arbitration – Dispute involving Malaysian company held by foreign party – Whether arbitration between parties was international arbitration – Whether 'domestic international arbitration' – Whether foreign party has place of business in any State other than Malaysia – Whether Arbitration Act 2005 or Malaysian law recognises domestic*
F *international arbitration – Arbitration Act 2005, ss. 2, 35 & 42*

The first appellant, Central Malaysian Properties Sdn Bhd ('CMP') was the developer of a reclamation project ('the project'). CMP was controlled by the first appellant, Tan Sri Vincent Tan ('VT'). The project was awarded to the first respondent, Jan De Nul (Malaysia) Sdn Bhd ('JDN'), a Malaysian
G company, whose ultimate holding company was the second respondent, Jan De Nul Group (Sofidra S.A) ('Sofidra'). CMP appointed JDN as the contractor to build a reclaimed platform and the contract was guaranteed by Sofidra ('the contract'). However, works could not start as CMP delayed in meeting its initial financial and payment security obligations. JDN issued a
H notice of default under the contract in relation to CMP's failure and the impasse was ironed out with VT guaranteeing the performance by CMP. A disaster occurred and much of the reclaimed platform gave way, causing suspension of works. In the meantime, several payments became overdue, prompting JDN to issue a notice notifying CMP of the same and giving CMP
I 14 days to remedy the default. When CMP failed to do so, JDN determined its employment under the contract on the ground of non-payment and further demanded outstanding payment from VT. When there was no positive response from CMP and VT, JDN took the dispute to arbitration and CMP

and Sofidra were added as parties. CMP counterclaimed against JDN for damages resulting in JDN's breach of contract and/or negligence in connection with the reclamation failure incident. The arbitral tribunal held that (i) JDN had validly terminated the contract; (ii) JDN had breached the contract and the implied warranty to undertake the works with reasonable care and skill and such breach caused the incident; (iii) JDN's claim was allowed and awarded damages in the sum of RM48,277,351.22; (iv) CMP's counterclaim was allowed and awarded damages in the sum of RM51,432,212.51; and (v) the sums due to VT and CMP were set-off from that due to JDN and Sofidra. Taking into account this set-off, JDN were ordered to pay CMP the amount of RM3,154,861.29. JDN and Sofidra applied under s. 35(1) of the Arbitration Act 2005 ('the Act') for the arbitral tribunal to correct the final award. The arbitral tribunal corrected the damages awarded to JDN and Sofidra from RM48,277,351.22 to RM48,642,828.94 and the amount ordered to be paid by JDN and Sofidra to VT and CMP from RM3,154,861.29 to RM2,789,383.57. All the parties challenged the arbitral tribunal's final award and the correction award before the High Court. JDN Group raised a preliminary objection against the originating summons by VT and CMP, to refer questions of law arising out of the final award pursuant to s. 42 of the Act, on the grounds that (i) the arbitration between the parties was an international arbitration within the meaning of s. 2 of the Act, as Sofidra was a foreign party and, therefore, Part III did not apply unless the parties 'opt in' in writing. The High Court ruled that Sofidra was only a nominal party. Dismissing the preliminary objection, the High Court held that the arbitration between the parties was domestic one and hence, the parties were entitled to file a reference on questions of law under s. 42 of the Act to the High Court. However, the High Court's decision was overturned by the Court of Appeal on the ground that the arbitration was an international arbitration and since the parties had not opted in under Part III of the Act, they were not entitled to file a reference on questions of law under s. 42. Hence, the present appeal. The issues that arose for adjudication were (i) whether the Act or Malaysian law recognises a domestic international arbitration given that the phrase 'domestic international arbitration' was not found in the Act ('question 1'); and (ii) whether s. 42 of the Act automatically applies to an arbitration governed by the laws of Malaysia notwithstanding that one or more parties to the arbitration may be foreign, as stated in *AJWA for Food Industries Co (MIGOP) v Pacific Inter-Link Sdn Bhd* ('*AJWA*') ('question 2').

Held (dismissing appeal with costs)
Per Azahar Mohamed FCJ delivering the judgment of the court:

(1) When the Court of Appeal used the term 'domestic international arbitration', it was for convenience and for illustrative purposes only to describe a type of international arbitration where one of the parties was a foreign party and the seat under the arbitration agreement was in Malaysia. When read in proper context, it was nothing more than to

distinguish three types of arbitral awards which the Court of Appeal viewed the Act recognises; one of them being international arbitration award arising from Malaysia, which it later called 'domestic international arbitration'. The term 'domestic international arbitration' was therefore merely a popular name used to distinguish the two types of 'international arbitration' *ie,* (i) international arbitration, which had its seat in Malaysia; and (ii) international arbitration, which was not seated in Malaysia and did not run foul of the Act. (para 63)

(2) It was clearly provided under the contract that the law governing the contract shall be the laws of Malaysia and the parties submitted to the jurisdiction of the Malaysian courts for the purpose of any action or proceedings or proceedings arising out of the contract. JDN and Sofidra argued that the agreement to adopt Malaysian law as the contractual governing law and to submit to the jurisdiction of the Malaysian courts could not be interpreted and equated to be an agreement to apply Part III of the Act and s. 42, as was done in the Court of Appeal in *AJWA*. Although the decision of the Court of Appeal in *AJWA* was affirmed by the Federal Court, the Federal Court did not decide on the issue of 'international arbitration' *vis-à-vis* 'domestic arbitration'. There was also no discussion on ss. 2 and 42 of the Act. The decision of *AJWA*, insofar as it related to the issue of 'international arbitration' and the applicability of s. 42 of the Act remained that of the Court of Appeal and the approach taken by the Court of Appeal's in *AJWA* was unprecedented. (paras 30, 36, 37 & 50)

(3) The operative words of para. (a) under s. 2 of the Act on the definition of the term 'international arbitration' were clear and unambiguous. The Legislative intent under s. 2 could not be ignored. Parliament saw it fit that, for the purposes of determining whether a particular agreement is an 'international arbitration', the only requirements of para. (a) are that: (i) a party; (ii) to an arbitration; and (iii) to have its place of business in any State other than Malaysia. Paragraph (a) of the definition term of the term 'international arbitration' requires reference to the specific arbitration agreement from which the dispute arose, as there must first exist an arbitration agreement between the parties, at least one of whom is foreign, before an 'international arbitration' is commenced. (paras 43-45)

(4) Given the clear and unambiguous language of the Act, the criteria to decide whether international or domestic arbitration is set out in s. 2 of the Act. The only pertinent aspect to be considered when determining the application, or otherwise, of Part III of the Act, which includes s. 42, is whether a foreign party, which has its place of business in any State other than Malaysia, is a party to the arbitration agreement. The laws governing the arbitration agreement were of no relevance. The agreement to adopt Malaysian law as the contractual governing law and

to submit to the jurisdiction of the Malaysian courts could not be interpreted and equated to be an agreement to apply Part III, and s. 42, of the Act. (para 57)

(5) There was no real necessity to answer question 1 as answering it would not affect the position of the parties or have any bearing to the outcome of this appeal. Question 2 was answered in the negative. The present arbitration was an international arbitration within the meaning of s. 2 of the Act. As the parties had not agreed to 'opt in' under Part III of the Act, s. 42 was not an avenue available to the parties. (paras 58 & 65)

***Bahasa Malaysia** Headnotes*

Perayu pertama, Central Malaysian Properties Sdn Bhd ('CMP') ialah pemaju satu projek penebusgunaan ('projek'). CMP dikawal oleh perayu pertama, Tan Sri Vincent Tan ('VT'). Projek ini diberi kepada responden pertama, Jan De Nul (Malaysia) Sdn Bhd ('JDN'), sebuah syarikat Malaysia, yang dipegang oleh syarikat utamanya iaitu responden kedua, Jan De Nul Group (Sofidra S.A) ('Sofidra'). CMP melantik JDN sebagai kontraktor untuk membina platform penebusgunaan dan kontrak ini dijamin oleh Sofidra ('kontrak'). Walau bagaimanapun, kerja-kerja tidak boleh bermula kerana CMP lewat dalam memenuhi kewajipan asal kewangan dan bayaran cagaran. JDN mengeluarkan notis keingkaran bawah kontrak tentang kegagalan CMP dan kebuntuan ini selesai apabila VT menjamin pelaksanaan oleh CMP. Kecelakaan berlaku dan sebahagian besar platform penebusgunaan tersebut roboh, menyebabkan kerja-kerja tergantung. Pada masa yang sama, beberapa bayaran menjadi tertunggak, mendorong JDN mengeluarkan notis memaklumkan CMP tentang hal ini dan memberi masa 14 hari kepada CMP untuk menyelesaikan keingkaran ini. Apabila CMP gagal berbuat demikian, JDN menamatkan perkhidmatan bawah kontrak atas alasan kegagalan membayar dan selanjutnya menuntut bayaran tertunggak daripada VT. Susulan ketiadaan balasan positif daripada CMP dan VT, JDN membawa pertikaian ke timbang tara dan CMP dan Sofidra disertakan sebagai pihak-pihak. CMP menuntut balas terhadap JDN untuk ganti rugi berikutan kegagalan kontrak JDN dan/atau kecuaian tentang insiden kegagalan penebusgunaan. Tribunal timbang tara memutuskan (i) JDN menamatkan kontrak secara sah; (ii) JDN melanggar kontrak dan waranti tersirat untuk menjalankan kerja-kerja dengan jagaan dan kemahiran munasabah dan pelanggaran ini menyebabkan insiden tersebut; (iii) tuntutan JDN dibenarkan dan diawardkan ganti rugi sebanyak RM48,277,351.22; (iv) tuntutan balas CMP dibenarkan dan diawardkan ganti rugi sebanyak RM51,432,212.51; dan (v) jumlah yang terhutang pada VT dan CMP ditolak selesai daripada jumlah yang terhutang pada JDN dan Sofidra. Berdasarkan tolak selesai ini, JDN diperintahkan membayar kepada CMP sebanyak RM3,154,861.29. JDN dan Sofidra memohon bawah s. 35(1) Akta Timbang Tara 2005 ('Akta') agar tribunal timbang tara membetulkan award akhir. Tribunal timbang tara membetulkan ganti rugi yang diawardkan kepada JDN

dan Sofidra daripada RM48,277,351.22 menjadi RM48,642,828.94 dan jumlah yang diperintahkan dibayar oleh JDN dan Sofidra kepada VT dan CMP daripada RM3,154,861.29 menjadi RM2,789,383.57. Semua pihak mencabar award akhir tribunal timbang tara dan pembetulan award di Mahkamah Tinggi. JDN Group membangkitkan bantahan awalan terhadap saman pemula oleh VT dan CMP, untuk merujuk soalan undang-undang yang berbangkit daripada award akhir bawah s. 42 Akta, atas alasan (i) timbang tara antara pihak-pihak adalah timbang tara antarabangsa dalam maksud s. 2 Akta, kerana Sofidra ialah pihak asing dan, oleh itu, Bahagian III tidak terpakai kecuali jika pihak-pihak, secara bertulis, memilih untuk turut serta. Mahkamah Tinggi menetapkan bahawa Sofidra cuma pihak nominal. Menolak bantahan awalan, Mahkamah Tinggi memutuskan bahawa timbang tara antara pihak-pihak bersifat domestik dan dengan itu, pihak-pihak berhak memfailkan rujukan soalan undang-undang bawah s. 42 pada Mahkamah Tinggi. Walau bagaimanapun, keputusan Mahkamah Tinggi diakas oleh Mahkamah Rayuan atas alasan timbang tara tersebut bukan timbang tara antarabangsa dan oleh kerana pihak-pihak tidak memilih turut serta, bawah Bahagian III Akta, mereka tidak berhak memfailkan rujukan soalan undang-undang bawah s. 42. Maka timbul rayuan ini. Isu-isu yang timbul untuk diputuskan adalah (i) sama ada Akta atau undang-undang Malaysia mengiktiraf timbang tara antarabangsa domestik kerana ungkapan 'timbang tara antarabangsa domestik' tidak ditemui dalam Akta ('soalan 1'); dan (ii) sama ada s. 42 Akta, secara automatik, terpakai pada timbang tara yang dikawal selia oleh undang-undang Malaysia walaupun satu atau lebih daripada satu pihak timbang tara mungkin pihak asing, seperti yang dinyatakan dalam *AJWA for Food Industries Co (MIGOP) v. Pacific Inter-Link Sdn Bhd* ('*AJWA*') ('soalan 2').

Diputuskan (menolak rayuan dengan kos)
Oleh Azahar Mohamed HMP menyampaikan penghakiman mahkamah:

(1) Apabila Mahkamah Rayuan menggunakan terma 'timbang tara antarabangsa domestik', ini digunakan untuk tujuan kesenangan dan menunjukkan contoh sahaja untuk menggambarkan jenis timbang tara antarabangsa iaitu salah satu pihak adalah pihak asing dan tempat perjanjian timbang tara ialah di Malaysia. Jika dibaca dalam konteks yang betul, ini tidak lebih daripada membezakan tiga jenis award timbang tara yang Mahkamah Rayuan berpendapat diiktiraf oleh Akta; salah satunya ialah award timbang tara antarabangsa yang timbul di Malaysia, yang kemudian dipanggil 'timbang tara antarabangsa domestik'. Oleh itu, terma 'timbang tara antarabangsa domestik' hanya sekadar nama popular untuk membezakan dua jenis 'timbang tara antarabangsa' iaitu (i) timbang tara antarabangsa, yang berjalan di Malaysia; dan (ii) timbang tara antarabangsa, yang tidak berjalan di Malaysia dan tidak melanggar Akta.

(2) Jelas diperuntukkan bawah kontrak bahawa undang-undang yang mengawal selia kontrak ialah undang-undang Malaysia dan pihak-pihak tunduk pada bidang kuasa mahkamah Malaysia untuk tujuan apa-apa tindakan atau prosiding yang timbul daripada kontrak. JDN dan Sofidra menghujahkan bahawa perjanjian mengguna pakai undang-undang Malaysia sebagai undang-undang kontrak yang mengawal selia dan untuk tunduk pada bidang kuasa mahkamah-mahkamah Malaysia tidak boleh ditafsirkan dan disamakan dengan perjanjian untuk mengguna pakai Bahagian III dan s. 42, seperti yang dilakukan oleh Mahkamah Rayuan dalam *AJWA*. Walaupun keputusan Mahkamah Rayuan dalam *AJWA* disahkan oleh Mahkamah Persekutuan, Mahkamah Persekutuan tidak memutuskan tentang isu 'timbang tara antarabangsa' berkaitan 'timbang tara domestik'. Tiada juga perbincangan tentang ss. 2 dan 42 Akta. Keputusan *AJWA*, setakat berkaitan isu 'timbang tara antarabangsa' dan pemakaian s. 42 Akta kekal di Mahkamah Rayuan dan pendekatan yang diambil oleh Mahkamah Rayuan dalam *AJWA* tiada duluan.

(3) Perkataan-perkataan tepat dalam perenggan (a) bawah s. 2 Akta tentang definisi terma 'timbang tara antarabangsa' jelas dan tiada kesamaran. Niat Badan Perundangan bawah s. 2 tidak boleh diketepikan. Parlimen berpendapat, untuk tujuan memutuskan sama ada satu-satu perjanjian ialah 'timbang tara antarabangsa', syarat-syarat perenggan (a) cumalah (i) satu pihak (ii) dalam timbang tara; dan (iii) mempunyai tempat urusannya di mana-mana negara selain Malaysia. Perenggan (a) definisi terma 'timbang tara antarabangsa' berkehendakkan rujukan pada perjanjian timbang tara yang khusus, yang daripadanya timbul pertikaian, kerana mestilah wujud perjanjian timbang tara antara pihak-pihak terlebih dahulu, sekurang-kurangnya salah satu ialah pihak asing, sebelum 'timbang tara antarabangsa' boleh bermula.

(4) Melihat pada bahasa Akta yang jelas dan tiada kesamaran, kriteria untuk memutuskan sama ada satu-satu timbang tara ialah timbang tara antarabangsa atau domestik ditetapkan oleh s. 2 Akta. Aspek relevan yang perlu dipertimbangkan dalam memutuskan permohonan, atau sebaliknya, Bahagian III Akta, yang termasuk s. 42, ialah sama ada pihak asing, yang mempunyai tempat urusan di mana-mana negara selain Malaysia, ialah pihak dalam perjanjian timbang tara. Undang-undang yang mengawal selia perjanjian timbang tara tersebut tidak relevan. Perjanjian untuk menerima pakai undang-undang Malaysia sebagai undang-undang kontrak yang mengawal selia dan untuk tunduk pada bidang kuasa mahkamah-mahkamah Malaysia tidak boleh ditafsir atau disamakan dengan perjanjian untuk mengguna pakai Bahagian III dan s. 42 Akta.

(5) Tiada keperluan untuk menjawab soalan 1 kerana menjawabnya tidak memberi kesan pada kedudukan pihak-pihak atau tidak mempunyai kaitan dengan keputusan rayuan ini. Soalan 1 dijawab secara afirmatif. Timbang tara ini ialah timbang tara antarabangsa dalam maksud s. 2 Akta. Oleh kerana pihak-pihak tidak bersetuju untuk memilih untuk turut serta bawah Bahagian III Akta, s. 42 bukanlah jalan yang tersedia buat pihak-pihak.

Case(s) referred to:

Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal [2013] 2 CLJ 395 CA ***(dist)***

Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd [2013] 7 CLJ 18 FC ***(refd)***

Astro Nusantara International BV and Others v. PT Ayunda Prima Mitra and Others [2012] SGHC 212 ***(refd)***

AV Asia Sdn Bhd v. Pengarah Kuala Lumpur Regional Centre For Arbitration & Anor [2013] 10 CLJ 115 HC ***(refd)***

Bharat Co-operative Bank (Mumbai) Ltd v. Co-operative Bank Employees Union [2007] 4 SCC 685 ***(refd)***

Chin Choy & Ors v. Collector of Stamp Duties [1978] 1 LNS 26 FC ***(refd)***

Exceljade Sdn Bhd v. Bauer (M) Sdn Bhd [2013] 1 LNS 1470 HC ***(refd)***

Gough v. Gough [1891] 2 QB 665 ***(refd)***

Husli Mok v. Superintendent of Lands and Surveys & Anor [2014] 9 CLJ 733 FC ***(refd)***

Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal [2017] 3 CLJ 257 FC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***

Mesuma Sports Sdn Bhd v. Majlis Sukan Negara Malaysia; Pendaftar Cap Dagangan Malaysia (Interested Party) [2015] 9 CLJ 125 FC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

Pentadbir Tanah Daerah Timur Laut, Pulau Pinang v. Yeoh Oon Theam [2017] 3 CLJ 557 CA ***(refd)***

PP v. Datuk Tan Cheng Swee & Ors [1979] 1 LNS 74 HC ***(refd)***

Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals [2018] 3 CLJ 557 FC ***(refd)***

Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 2, 3(3), (4), 9(1), 35(1), 37, 42

Other source(s) referred to:

Sundra Rajoo and WSW Davidson, *The Arbitration Act 2005, UNCITRAL Model Law As Applied In Malaysia,* para 3.1

(Civil Appeal No: 02(f)-8-02-2018(W))

For the appellants - Kamraj Nayagam, Kent Chai & Dawn Wong; M/s Mah-Kamariyah & Philip Koh

For the respondents - Rajendra Navaratnam, Raja Kumar Raja Kandan & Mak Hon Pan; M/s Azman Davidson & Co

(Civil Appeal No: 02(f)-7-02-2018(W))

For the appellants - Rajendra Navaratnam, Raja Kumar Raja Kandan & Mak Hon Pan; M/s Azman Davidson & Co

For the respondents - Kamraj Nayagam, Kent Chai & Dawn Wong; M/s Mah-Kamariyah & Philip Koh

[Editor's note: For the Court of Appeal judgment, please see Vincent Tan Chee Yioun & Anor v. Jan De Nul (Malaysia) Sdn Bhd & Anor & Other Appeals [2017] 1 LNS 1130 (affirmed). For the High Court judgment, please Jan De Nul (Malaysia) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor & Other Cases [2016] 1 LNS 1234 (overruled).]

Reported by Najib Tamby

JUDGMENT

Azahar Mohamed FCJ:

Introduction

[1] There are two related appeals before this court, which originated from an arbitral proceeding at the Kuala Lumpur Regional Centre For Arbitration (now known as Asian International Arbitration Centre). The arbitration arose out of a project in Johor Bahru, involving, in part, the reclamation of 2km of shoreline in Johor Bahru in close proximity to the causeway connecting Johor Baharu to Singapore. The questions of law for which leave to appeal were granted relate to s. 37 (application in the High Court for setting aside arbitral award) and s. 42 (reference to the High Court on questions of law) of the Arbitration Act 2005 ("Act").

[2] The first appeal, which is Federal Court Civil Appeal No: 02(f)-7-02-2018(W), is filed by Jan De Nul (Malaysia) Sdn Bhd ("JDN") and Jan De Nul Group (Sofidra S.A) ("Sofidra") (unless addressed separately, they will be referred to as "JDN Group") against the decision of the Court of Appeal in dismissing the appeal (Civil Appeal No. W-02(C)(A)-1400-08-2016) pursuant to s. 37 of the Act on 24 October 2017 ("the s. 37 appeal").

[3] The second appeal, which is Federal Court Civil Appeal No: 02(f)-8-02-2018 (W) is filed by Tan Sri Vincent Tan Chee Yioun ("VT") and Central Malaysian Properties Sdn Bhd ("CMP") against the decision of the Court of Appeal in allowing JDN Group's preliminary objection that the arbitration between parties was an international arbitration and accordingly dismissing the s. 42 of the Act appeal (Civil Appeal No. W-02(C)(A)-1402-08-2016) on 18 August 2017 ("the s. 42 appeal").

[4] This judgment will deal only with the s. 42 appeal. We will deal with the s. 37 appeal in a separate judgment.

A **Overview Of The s. 42 Appeal**

[5] The s. 42 appeal concerns the decision of the Court of Appeal allowing the JDN Group's cross-appeal in relation to a preliminary objection raised in the High Court. The preliminary objection raised was that the arbitral award in question was made in an international arbitration within the
B meaning of s. 2 of the Act and therefore s. 42 thereof did not apply. The preliminary objection was dismissed. The High Court ruled that the arbitration between VT, CMP, JDN and Sofidra was a domestic arbitration and therefore the parties were entitled to file a reference on questions of law under s. 42 of the Act. On appeal, the Court of Appeal, however, found that
C the arbitration under reference was in fact an international arbitration, given that Sofidra is a foreign party. As the parties had not agreed in writing to "opt-in" Part III of the Act, the Court of Appeal held that s. 42 was not applicable in the present case.

[6] Before us, one of the important points of law in controversy in the
D s. 42 appeal is whether the arbitration between parties was an international arbitration or a domestic arbitration.

[7] It must, however, be noted that Parliament had most recently amended the Act by way of Arbitration (Amendment) (No. 2) Act 2018 Act, (Act A1569). With effect from 8 May 2018, among others, the entire
E provision of reference on questions of law under s. 42 had been deleted. Currently, therefore, the only recourse against an arbitral award is a setting-aside action under s. 37 of the Act.

Essential Facts

F **[8]** CMP, a private company limited by shares incorporated in Malaysia, was the developer of a project that comprised a reclamation of a plot of 38.11 hectares of land along about a 2km long stretch of existing shoreline bordering Jalan Abu Bakar and Jalan Skudai in Johor Bahru, just west of the causeway connecting Johor to Singapore ("the project"). VT controls CMP.
G It awarded the project to JDN, a private company limited by shares incorporated in Malaysia. JDN is a specialist in reclamation of land from sea, whose ultimate holding company is Sofidra, a company incorporated and based in Luxembourg. Sofidra is a foreign entity at all material time. As we shall explain later in the judgment, this is an important point that should
H be kept in mind.

[9] CMP appointed JDN as the contractor for the project by a letter of award dated 9 February 2010. JDN was required to build a reclaimed platform from the sea coast on which CMP intended to develop commercial and residential buildings. The parties on 23 March 2010 then executed a
I formal contract based on the Construction Industry Development Board Standard Form of Contract For Building Works ("the contract"). By parent company guarantee dated 9 February 2010, Sofidra guaranteed the performance of JDN's obligations under the contract.

[10] JDN commenced mobilisation of its site staff and auxiliary equipment on 1 March 2010. However, works could not start as planned due to CMP's delays in meeting its initial financial and payment security obligations. This was not an isolated incident. The payment problem could not be resolved.

[11] Then problem started brewing. As no progress was made in resolving this issue, JDN on 15 July 2010, issued a notice of default under the contract in relation to CMP's failure to pay the advance payment as well as progress claim certificates No. 1 and No. 2, which were also overdue at that material time.

[12] The impasse was ironed out with VT executing a guarantee dated 2 September 2010 ("personal guarantee") in his personal capacity, guaranteeing, as primary obligator and not as a surety, unconditionally, the due and punctual performance by CMP of each and all the obligations, warranties, duties and undertakings of CMP under and pursuant to the contract or where the contract fails, under and pursuant to the laws of Malaysia.

[13] JDN then commenced works on 8 October 2010. Nevertheless, by the end of October 2010, progress claim certificates No. 5 and No. 6 became due and outstanding resulting in CMP being in default of payment under the contract.

[14] As it happened, a disaster occurred. At about 10pm on the evening of 12 November 2010, without warning, much of the reclaimed platform gave way and collapsed into the sea resulting in the loss of one life ("reclamation failure incident or RFI"). As a result, JDN on 15 November 2010 received a written instruction from the superintending officer ("SO") to suspend all reclamation and filling works. In the meantime, several payments on the progress claim certificates duly certified by the SO had again become overdue. On 16 November 2010, JDN issued a notice notifying CMP that it had defaulted in its payment of progress claim certificates No. 5 and 6 thereby giving CMP 14 days to remedy the default.

[15] The dispute arose when CMP failed to remedy the aforesaid default. As a result, JDN on 2 December 2010 proceeded to determine its employment under the contract on the ground of non-payment on the progress certificates. At the same time, JDN also demanded outstanding payment from VT pursuant to the personal guarantee. As there was no positive response from CMP and VT, in accordance with the contract, JDN took the prerequisite steps to refer the dispute to arbitration.

Arbitration Proceedings

[16] The arbitration commenced with the filing of a notice of arbitration dated 12 August 2011 by JDN against VT, claiming payment for the work done. Following the notice of arbitration, an arbitral tribunal was constituted on 31 January 2012.

[17] Subsequently, CMP and Sofidra were added into arbitration by way of a submission agreement dated 20 June 2012 in order to submit all their disputes arising out of the contract, parent company guarantee and the personal guarantee to be determined by the arbitral tribunal. CMP had also counterclaimed against JDN for damages resulting from JDN's breach of contract and/or negligence in connection with the RFI.

[18] The arbitral proceedings resulted in the final award dated 3 September 2015. In summary, the arbitral tribunal, *inter alia*, held:

(i) JDN validly terminated the contract;

(ii) JDN had breached the contract and the implied warranty to undertake the works with reasonable care and skill, and that such breach caused the RFI;

(iii) JDN's claim was allowed and awarded damages in the sum of RM48,277,351.22;

(iv) CMP's counterclaim was allowed and awarded damages in the sum of RM51,432,212,51; and

(v) The sums due to VT and CMP were set-off from that due to JDN and Sofidra. Taking into account this set-off, JDN and Sofidra were ordered, jointly and severally, to pay CMP the amount of RM3,154,861.29.

[19] On 24 September 2015, JDN and Sofidra applied under s. 35(1) of the Act for the arbitral tribunal to correct the final award. On 5 October 2015, the tribunal issued the correction to the final award: correcting the damages awarded to JDN and Sofidra from RM48,277,351.22 to RM48,642,828.94; and correcting the amount ordered to be paid by JDN and Sofidra to VT and CMP from RM3,154,861.29 to RM2,789,383.57.

Proceedings In The High Court

[20] All parties challenged the arbitral tribunal's final award (and the correction award) before the High Court as follows:

(i) Originating Summons 24C(ARB)-32-10-2015 ("OS 32") filed by JDN and Sofidra to refer questions of law arising out of the final award pursuant to s. 42 of the Act;

(ii) Originating Summons 24C(ARB)-34-10-2015 ("OS 34") filed by VT and CMP to refer questions of law arising out of the final award pursuant to s. 42 of the Act; and

(iii) Originating Summons 24C(ARB)-45-12-2015 ("OS 45") filed by JDN and Sofidra under s. 37 of the Act to set aside parts of the final award which allowed CMP's counterclaim.

[21] JDN Group raised a preliminary objection to OS 34 based on the ground that the arbitration between the parties was an international arbitration within the meaning of s. 2 of the Act and therefore Part III did not apply unless the parties "opt-in" in writing. It was contended that the arbitration was an international arbitration given that Sofidra was a foreign party and there was no agreement between the parties to opt-in to Part III of the Act. Therefore, as contended by JDN Group, the applications filed by the parties under s. 42 of the Act should be dismissed.

[22] It bears noting that JDN Group had filed their OS 32 without prejudice to their rights to raise a preliminary objection that the parties in the arbitration agreement had not agreed in writing to opt-in Part III of the Act (including s. 42) and hence the applications filed by all parties before the court under s. 42 of the Act ought to be dismissed.

[23] On 24 June 2016, the High Court dismissed the preliminary objection. As stated earlier, the High Court held that the arbitration between the parties was indeed a domestic arbitration and hence, the parties were entitled to file a reference on questions of law under s. 42 of the Act to the High Court. The High Court was not prepared to accept that the arbitral award was one arising from international arbitration notwithstanding that one of the parties to the arbitration was a company registered outside Malaysia. Further, the High Court ruled that Sofidra, the foreign party, is only a nominal party.

Proceedings At The Court Of Appeal

[24] On appeal, the Court of Appeal on 18 August 2017 overturned the High Court's decision. Among the grounds on which the Court of Appeal overturned the decision of the High Court are as follows:

(1) It is clear from the Submission Agreement that there are four parties to the Submission Agreement. The Act will apply to parties to written arbitration agreements or submission agreements;

(2) Sofidra is a party to the Submission Agreement and will be liable to indemnify under the Parent Company Guarantee;

(3) VT and CMP having signed the Submission Agreement should not have canvassed the point that Sofidra who is a party to the Submission Agreement is only a nominal party;

(4) The phrase "nominal party" is not in existence under the Act;

(5) The Act recognises at least three types of arbitral awards, namely: (i) foreign arbitral awards arising from international arbitration outside Malaysia; (ii) international arbitration awards arising from Malaysia; and (iii) domestic awards from Malaysia;

(6) When it relates to international arbitration, where one of the parties is a foreign party and the seat under the arbitration agreement or submission agreement is in Malaysia, it is now popularly known as domestic international arbitration;

(7) Section 42 of the Act does not apply to domestic international arbitration; and

(8) The criteria under the Act to determine domestic or international arbitration is not based on what governing law party chooses.

[25] In summary, the Court of Appeal ruled that the arbitration was an international arbitration and since the parties had not opted-in to Part 111 of the Act (including s. 42), the parties were not entitled to file a reference on questions of law under s. 42. Accordingly, the Court of Appeal dismissed Civil Appeal No. W-02(C)(A)-1402-08-2016. This was the decision of the Court of Appeal, which gave rise to the s. 42 appeal before us.

[26] We now turn to consider the questions of law involved in this appeal.

The Questions Of Law On Appeal To The Federal Court

[27] On 18 September 2017, VT and CMP filed a motion to seek leave to appeal to the Federal Court against the decision of the Court of Appeal given on 18 August 2017 in allowing JDN Group's preliminary objection. On 5 February 2018, this court granted leave to appeal to VT and CMP on the following two questions of law:

(i) Whether the Act or Malaysian law recognises a domestic international arbitration given that the phrase "domestic international arbitration" is not found in the Act? ("question 1")

(ii) Whether s. 42 of the Act automatically applies to an arbitration governed by the laws of Malaysia notwithstanding that one or more parties to the arbitration may be foreign, as stated in *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395, CA ("*AJWA*")? ("question 2")

[28] As we have seen earlier, it was pursuant to the order of this court dated 5 February 2018 that the s. 42 appeal was filed by VT and CMP.

[29] We will deal first with question 2 since it is the pivotal question of law in this appeal.

Question 2

[30] In addressing this issue, it is important to note, as a starting point, that it was clearly provided under cl. 49.1 of the contract that the law governing the contract shall be the laws of Malaysia and the parties hereby submit to the jurisdiction of the Malaysian Courts for the purpose of any action or proceedings arising out of the contract:

> 49 GOVERNING LAW
>
> 49.1 Law
>
> The law governing the Contract shall be the law of Malaysia, and the parties hereby submit to the jurisdiction of the Malaysian Courts for the purpose of any action or proceedings arising out of the Contract.

Further, the submission agreement also provides as follows:

> This Submission Agreement shall be governed by and construed in accordance with the laws of Malaysia.

[31] Before us, on the basis of the abovementioned clauses, the main thrust of the argument of learned counsel for VT and CMP was that s. 42 of the Act applies to arbitrations applying Malaysian law and subject to the exclusive jurisdiction of the Malaysian Courts notwithstanding that one of the parties may be a foreigner. To support his contention, learned counsel relied substantially on the judgment of the Court of Appeal in *AJWA*. Learned counsel argued that in *AJWA*, the Court of Appeal decided that s. 42 is applicable simply because there was an agreement to apply the laws of Malaysia to the disputes therein.

[32] In *AJWA*, the Court of Appeal dealt with such an issue and held that in limited circumstances, even if parties have not opted-in to Part III of the Act (which s. 42 is found), some provisions of Part III may arguably apply. In *AJWA*, the respondent submitted that as the appellant had its place of business in Egypt, s. 42 was not applicable. The respondent also submitted that there was no agreement in writing between the parties that Part III of the Act would apply.

[33] The Court of Appeal in *AJWA* in this regard held as follows:

> [35] The respondent's position is that the appellant has no basis to invoke s. 42 of the Act which falls under Part III of the Arbitration Act 2005. The respondent argued that the PORAM arbitration between the appellant and the respondent falls under the category of an international arbitration by virtue of the definition under s. 2 of the Act which defines "International arbitration" to mean "an arbitration where (a) one of the parties to an arbitration agreement at the time of the conclusion of that agreement, has its place of business in any state other than Malaysia'. In the present case, it is not disputed that at the material times the appellant was having its place of business in Egypt, a state other than Malaysia. Therefore, the respondent submitted s. 42 which falls under PART III of the Act is not applicable by virtue of s. 3(3)(b) of the Act which provides that "in respect of an international, arbitration, where the seat of arbitration is in Malaysia: (b) Part III of this Act shall not apply unless the parties agree otherwise in writing". The respondent further submitted, that there has never been any agreement in writing between the parties that PART Ill of the Act to apply.
>
> [36] The appellant on the other hand contended that the contention of the respondent is misconceived. The appellant further contended that it has from the beginning disputed the existence of the arbitration agreement between the parties; and therefore it cannot be right to say that it cannot invoke s. 42 of the Act to refer the question of law – namely whether or not there was an arbitration agreement between the parties to the court under the section.

[34] Learned counsel specifically brought to our attention the following passage in the judgment of the Court of Appeal in *AJWA* to support his contention that the laws governing the arbitration agreement is of relevance to determine whether the parties are entitled to file a reference on question of law under s. 42 to the Act:

> [37] In this respect we are in full agreement with the finding of the learned High Court Judge that the provision of s. 42 of the Act is applicable. At p. 10 of the grounds of judgment, the learned judge ruled:
>
> > However, I think the Plaintiff made a valid argument that it could not be the intention of legislature to shut out a party to arbitration from invoking section 42 to raise a basic question of law such as that on the jurisdiction to arbitrate by the Tribunal to the Court. Such question goes to the root of the arbitration proceedings. Further, the Plaintiff has correctly pointed out that in the arbitration agreement relied upon by the Defendant (and which is being disputed by the Plaintiff), there is an agreement that all legal matters will be governed and interpreted in accordance with the laws of Malaysia and subject to the exclusive jurisdiction of the Malaysian Courts in Kuala Lumpur. By virtue of this agreement in the purported arbitration agreement, I am of the view that the Defendant submission on the non-applicability of section 42 is baseless.

[35] The Court of Appeal in the present case, however, took a diametrically opposite view: the criteria to decide whether international or domestic arbitration is set out in s. 2 as well as s. 3 of the Act and not based on what governing law party chooses. In taking a different approach, the Court of Appeal said as follows:

> [22] In the instant case, if we are to subscribe to the argument of appellants/claimants to the award to say that section 42 will apply to all domestic international arbitration award when the parties have chosen the Malaysian law, that *per se* will not subscribe to any clear provisions of the law and will fall foul of section 30. The criteria under the AA 2005 to determine domestic or international arbitration is not based on what governing law party chooses. Such a submission in our view is misconceived. The criteria to decide whether international or domestic arbitration is set out in section 2 as well as section 3 which has to be read harmoniously.

[36] In resisting the present appeal, learned counsel for JDN and Sofidra strenuously argued that the agreement to adopt Malaysian law as the contractual governing law and to submit to the jurisdiction of the Malaysian Courts cannot be interpreted and equated to be an agreement to apply Part III of the Act (and s. 42), as was done in the Court of Appeal in *AJWA*. Learned counsel said that no legal authority was cited by the Court of Appeal in *AJWA* save that the Court of Appeal agreed with the decision of the High Court below that s. 42 of the Act was applicable simply because there was an agreement to apply the laws of Malaysia to the disputes therein.

[37] In deciding this question, it is important to highlight that although the decision of the Court of Appeal in *AJWA* was affirmed by the Federal Court, the Federal Court in *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd* [2013] 7 CLJ 18; [2013] 5 MLJ 625 did not decide on the issue of "international arbitration" *vis-à-vis* "domestic arbitration". The Federal Court, in this respect, decided the case by laying down the law in relation to the requirements of an arbitration agreement within the meaning of s. 9 of the Act. There was no discussion of ss. 2 and 42 of the Act. Hence, the decision of *AJWA*, in so far as it relates to the issue of "international arbitration" and the applicability of s. 42 of the Act remains that of the Court of Appeal.

[38] In our opinion, the principal question of law for determination by this court, in essence, involves the construction and application of a point of law as to what constitutes an "international arbitrations" within the meaning of s. 2 of the Act.

Threshold For An Arbitration To Be International Arbitration

[39] The key to the issue is the meaning attributed to the term "international arbitration". The question must be approached on the basis of the definition in s. 2 of the Act. The provision is of critical importance to the appeal. It clearly stipulates that "international arbitration" means (it does not say "includes") an arbitration where:

> (a) One of the parties to an arbitration agreement, at the time of the conclusion of that agreement, has its place of business in any State other than Malaysia;

[40] The construction of the definition of the term "international arbitration" contained in para. (a) above is a matter of importance in this case. As is the case here, the task of the court is to give full effects to the provisions, which Parliament has enacted. The court must begin its task of interpretation by carefully considering the language used in the legislation (see *Mesuma Sports Sdn Bhd v. Majlis Sukan Negara Malaysia; Pendaftar Cap Dagangan Malaysia (Interested Party)* [2015] 9 CLJ 125; [2015] 6 AMR 314).

[41] The first thing to note is that the word "means" indicates an exhaustive meaning which, for the purpose of the Act, must invariably be attached to the term "international arbitration". In general, when definition of a word begins with the term "means" it is indicative of the fact that the meaning of the term has been restricted; that is to say, it would not mean anything else but what has been designated in the definition itself. In *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624; [2002] 2 MLJ 707 Gopal Sri Ram JCA (as he then was) explained the meaning of the word "means" in the following terms: when the word "means" is employed to define something, there is a rebuttable presumption of statutory interpretation that Parliament intends to restrict the meaning of the expression defined. Borrowing the words of Lord Esher MR in the case of

Gough v. Gough [1891] 2 QB 665, it is a hard and fast definition, and the result is that one cannot give any other meaning to the term "international arbitration" in the Act which is mentioned in the definition (see also *Bharat Co-operative Bank (Mumbai) Ltd v. Co-operative Bank Employees Union* [2007] 4 SCC 685, *Public Prosecutor v. Datuk Tan Cheng Swee & Ors* [1979] 1 LNS 74; [1979] 1 MLJ 166, *Pentadbir Tanah Daerah Timur Laut, Pulau Pinang v. Yeoh Oon Theam* [2017] 3 CLJ 557; [2016] MLJU 1126).

[42] The basic point is that the primary duty of a court is to ascertain from the words that Parliament has approved as expressing its intention what the intention was, and to giving effect to it (see *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645; [2002] 1 MLJ 385 and *Chin Choy & Ors v. Collector of Stamp Duties* [1978] 1 LNS 26; [1979] 1 MLJ 69). The cardinal rule of interpretation is that when the language used in a statute is clear, effect must be given to it and no outside consideration can be called in aid to find that intention (see *Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals* [2018] 3 CLJ 557 and *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177).

[43] The operative words of para. (a) of the definition of the term "international arbitration" are clear and unambiguous. The provision means what it says. There is no ambiguity found within the paragraph. The provision is drafted in a plain language; it is not difficult to comprehend and it poses no problem of interpretation. The legislative intent underlying s. 2 cannot be ignored. The essential point is that Parliament saw it fit that for the purposes of determining whether a particular agreement is an "international arbitration", the only requirements of para. (a) are that:

(i) a party;

(ii) to an arbitration agreement; and

(iii) to have its place of business in any State other than Malaysia.

[44] In our opinion, the plain and interpretation of the words does bear out the proposition advanced by learned counsel for JDN and Sofidra that the threshold of international arbitration under s. 2 of the Act was clearly satisfied.

[45] It is significant to note that para. (a) of the definition of the term "international arbitration" requires reference to the specific arbitration agreement from which the dispute arises, as there must first exist an arbitration agreement between the parties, at least one of whom is foreign, before an "international arbitration" is commenced. The submission agreement dated 20 June 2012, at all material times, is the operative arbitration in the present case. In this regard, we see no merit in the contention of learned counsel for VT and CMP that there was an initial arbitration that was initiated by JDN against VT. According to his contention, this initial arbitration was a domestic arbitration and had created an accrued right to refer questions of law under s. 42.

[46] In our opinion, the submission agreement was the agreement, which submitted all disputes between CMP, VT, JDN and Sofidra for the determination of the arbitral tribunal in the present arbitration. By reason of the difficulties and technicalities of having three separate arbitration agreements and three separate rules and procedures for the arbitration process, all the parties entered into the submission agreement, a fresh arbitration agreement, to refer all the existing disputes to the arbitral tribunal for determination by arbitration in accordance with the KLRCA Rules. Section 2 of the Act provides that "arbitration agreement" means an arbitration agreement defined in s. 9, and s. 9(1) provides that arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. In our opinion, the submission agreement was an arbitration agreement, which refers existing disputes between the parties to arbitration. The jurisdiction of the tribunal came from the submission agreement. This is clear on the terms of the submission agreement itself, which *inter alia* provides:

NOW THE PARTIES AGREE that:

1. All the Parties' existing disputes under the Agreements shall be referred to the Tribunal for determination by arbitration in accordance with the KLRCA Rules.
2. This Submission Agreement confers jurisdiction on the Tribunal to determine all existing disputes between the parties arising out of or in relation to the Agreements, and whether arising by way of claims or counterclaim.
3. For the avoidance of doubt, any conditions precedent to a reference to arbitration of disputes under the Agreements are waived by the Parties.

[47] Sofidra was a party to the submission agreement and has its place of business at 34-36 Pare d' Activites Capellen, 8308 Capelien – Grand Duchy of Luxembourg, in Luxembourg. In the present case, it is an indisputable fact that Sofidra is not a Malaysian party. Sofidra, being an international party to the submission agreement, renders the arbitration in the present case an 'international arbitration' within the meaning of s. 2. Hence, all the attributes of para. (a) of the definition of the term "international arbitration" are present.

[48] Moreover, in our opinion, s. 2 of the Act merely requires a "party" to have its place of business in any State other than Malaysia. It does not require the party to be a "substantive party" as contended by learned counsel for the VT and CMP. The extent of the party's participation, in our opinion, is immaterial in determining whether arbitration is an "international arbitration" within the meaning of s. 2. In any event, whilst Sofidra was a "nominal claimant" in the arbitration because it had no cause of action against CMP and VT, Sofidra was certainly a substantive party by reason of its exposure to pay damages under the final award.

[49] It was further argued that Sofidra was only a "nominal party", and that the Court of Appeal dismissed this point merely by taking the view that the phrase "nominal party" was not in existence under the Act. This line of argument does not persuade us. In point of fact, it is clear from the judgment that the Court of Appeal did not dismiss this point on the sole reason that the phrase "nominal party" was not in existence under the Act. This is what the Court of Appeal said on this issue:

> [16] We do not wish to dwell on the issue of "nominal party" in great detail as we take the view that the phrase "nominal party" is not in existence under AA 2005. AA 2005 will only apply to parties to written arbitration agreement or submission agreement.
>
> [17] In our view, the 2nd respondent is a party to the submission agreement and will also be liable to indemnify under the guarantee. The 1st and 2nd appellants having signed the submission agreement should not have canvassed the point that the 2nd respondent who is a party to the submission agreement is only a nominal party. This is not a jurisprudence advocated or arising from the Model Law. Further, it is now a fact that the 1st and 2nd appellants have obtained an arbitral award against the 1st and 2nd respondents. The 1st and 2nd respondents will be obliged to honour the arbitral award. In consequence, we find no merit in the appellants' argument that the 2nd respondent is only a "nominal party". In addition, even by the methodology and jurisprudence relating to interpretation of contractual documents as well as an Act of Parliament, any reasonable tribunal appraised with the facts and law will not conclude that the 2nd respondent is a "nominal party" to the arbitration ...

[50] As to the point raised by learned counsel for CMP and VT, in reliance of the Court of Appeal decision in *AJWA*, that s. 42 Act applied to arbitrations applying Malaysian law and subject to jurisdiction of the Malaysian Court, we find difficulty in accepting this line of arguments. The approach taken by the Court of Appeal in *AJWA* is unprecedented. The difficulty created by the Court of Appeal is that there is nothing in s. 2 that is capable to be read that s. 42 is applicable merely because there is an agreement to apply the laws of Malaysia in the disputes therein. An important statutory interpretation that is applicable here is that court cannot read or add words into a statute (see *Husli Mok v. Superintendent of Lands and Surveys & Anor* [2014] 9 CLJ 733; [2014] 6 MLJ 766). As judges, we are not entitled to read words into a statute unless clear reason for it is to be found in the statute itself (see *Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal* [2017] 3 CLJ 257; [2016] 5 MLJ 141). The Court of Appeal in *AJWA* cited no legal authority to support the proposition that s. 42 of the Act is applicable merely for the reason that there was an agreement to apply the laws of Malaysia to the disputes. There seems to be no authority for this proposition. In this regard, the Court of Appeal in *AJWA* fell into error in disregarding and not giving full effect to the provision of s. 2. Without any express provisions to the contrary, the clear wording of the provision must be given effect. It is evident that the full effect of the provisions was not

articulated before the Court of Appeal in *AJWA*. It would be a fundamental oversight to ignore the definition given to particular words by the statute itself. There is very little mention of s. 2 of the Act in *AJWA*. The Court of Appeal failed to accord the importance it deserved. The Court of Appeal in *AJWA* cannot give any other meaning to the term "international arbitration" in the Act, which is mentioned in the definition provision. With all respect, no other meaning other than which is put in the definition can be assigned to the term "international arbitration".

[51] Accordingly, the reasoning of the Court of Appeal in *AJWA* that merely because of the agreement that all legal matters will be governed and interpreted in accordance with the laws of Malaysia, s. 42 must apply is with respect, inaccurate.

[52] Undeniably, in the present case all the parties agreed that the submission agreement shall be governed by and construed in accordance with the laws of Malaysia. This must of necessity mean that the Act applies. Nonetheless, it must also be understood that the applicability or otherwise of Part III thereof must be a matter of the particular provisions of the Act, which excludes the applicability of Part III (which s. 42 is found), to international arbitrations as defined in the Act unless the parties to an arbitration agreement agree otherwise in writing.

[53] To that end, s. 3(3) and 3(4) of the Act provide:

> (3) In respect of an **international arbitration**, where the seat of arbitration is in Malaysia
>
> (a) Parts I, II and IV of this Act shall apply; and
>
> (b) **Part 111 of this Act shall not apply unless the parties agree otherwise in writing** (emphasis added)
>
> (4) For the purposes of paragraphs (2)(b) and (3)(b), the parties to a domestic arbitration may agree to exclude the application of Part III of this Act **and the parties to an international arbitration may agree to apply Part 111 of this Act, in whole or in part.** (emphasis added).

[54] Based on the clear and unambiguous language of ss. 2 and 3 of the Act, it is plain for us to see that Part III (including s. 42) is expressly excluded for international arbitration (with no exceptions) unless the parties otherwise agree in writing. As stated in *The Arbitration Act 2005, UNCITRAL Model Law As Applied In Malaysia* by Sundra Rajoo and WSW Davidson at para 3.1, "Once the parties have determined whether a particular arbitration is to be classified as 'international' or 'domestic', they are then free to 'opt-in' to or 'opt-out' of, as the case may be, from Part III of the Act' This is generally referred to as party autonomy. In other words, Part Ill of the Act does not apply to an "international arbitration" award unless specifically "opted-in"

in writing by the parties. In *Exceljade Sdn Bhd v. Bauer (M) Sdn Bhd* [2013] 1 LNS 1470; [2014] 1 AMR 253, Nallini Pathmanathan J (as she then was) correctly remarked, at para. 5 of Her Ladyship's judgment, as follows:

> The Arbitration Act 2005 is modelled on UNCITRAL Model Law ("The Model Law'). However, s 42 is one of the few sections that has no parallel in the Model Law. As such, no recourse may be made to the Model Law to ascertain or construe this section. Section 42 falls within Part III of the Act. Part III, including s. 42, applies automatically to domestic arbitrations unless parties "opt out". International arbitrations do not fall within the scope of Part III and thereby s 42, unless the parties specifically choose to "opt in".

[55] The application of s. 3 of the Act was considered in *AV Asia Sdn Bhd v. Pengarah Kuala Lumpur Regional Centre For Arbitration & Anor* [2013] 10 CLJ 115, Mary Lim J (as she then was) observed:

> [12] Actually, from as early as s. 3(4), the parties to arbitration are given a choice as to the application of Part III of the Act; and that choice extends even to whether that application is in whole or in part. Part III concerns "additional provisions relating to arbitration" and it relates to matters such as consolidation of proceedings and concurrent hearings; determination of preliminary point of law by court; reference of questions of law; appeal; costs and expenses of an arbitration; extensions of time for commencing arbitration proceedings and award.

[56] The parties in the present case had not agreed in writing to "opt-in" Part III of the Act. Section 42 is therefore not an avenue available to the parties. Therefore, courts have no jurisdiction to determine both the applications under s. 42 of the Act filed by both sides.

[57] We, therefore agree, with the Court of Appeal decision in the present case to this extent: Given the clear and unambiguous language of the Act, the criteria to decide whether international or domestic arbitration is set out in s. 2 of the Act. The only pertinent aspect to be considered when determining the application (or otherwise) of Part III of the Act, which includes s. 42, is whether a foreign party, that is to say, a party who has its place of business in any State other than Malaysia is a party to the arbitration agreement. The laws governing the arbitration agreement are of no relevance. In our opinion, the agreement to adopt Malaysian law as the contractual governing law and to submit to the jurisdiction of the Malaysian Courts cannot be interpreted and equated to be an agreement to apply Part III (and s. 42) of the Act.

[58] On question 2, we, therefore, conclude that the present arbitration is clearly an international arbitration within the meaning of s. 2 of the Act. The laws governing the arbitration agreement are of no relevance. As parties have not agreed to "opt-in" Part III of the Act, s. 42 is therefore not an avenue available to the parties. Our answer to question 2 is therefore in the negative.

[59] Now, we come to question 1.

Question 1

[60] This question concerns the term "domestic international arbitration", which as submitted by learned counsel for VT and CMP is not found or defined in the Act. It was further argued that since the phrase "domestic international arbitration" is not found in the Act, the Court of Appeal, had erred in holding that the present arbitration was a domestic international arbitration. According to learned counsel, the Act only recognised either domestic or international arbitration; no such hybrid between domestic and international arbitration is provided under the Act.

[61] The Court of Appeal in the present case commented that a domestic international arbitration award refers to an award arising out of an international arbitration where the seat is Malaysia. It is very important to understand the context in which the Court of Appeal made the remark. The relevant part of the judgment of the Court of Appeal is as follows:

> [20] In our view, (a) AA 2005 is a new legislation and in consequence the application of the Act as well as case laws stands to be in an evolutionary process depending on the strength of the submission before the court at any given material time. This is so because much reliance in international arbitration is placed on cases outside our jurisdiction; (b) AA 2005 recognises at least 3 types of arbitral awards, namely: (i) foreign arbitral awards arising from international arbitration outside Malaysia; (ii) international arbitration awards arising from Malaysia; (iii) domestic awards from Malaysia. The sections relevant to foreign arbitral award are only sections 38 and 39. There is another category of award ie, domestic award of a foreign country. Whether such an award can be enforceable in Malaysia under sections 38 and 39 is questionable as AA 2005 has not subsumed all parts of the New York Convention and the Model Law is related to international arbitration, which will not include domestic arbitration. Malaysia has adopted the Model Law for international arbitration as well as its own domestic arbitration with no clear provision to accommodate a domestic foreign arbitral award.
>
> [21] When it relates to international arbitration, where one of the parties is a foreign party and the seat under the arbitration agreement or submission agreement is in Malaysia, it is now popularly known as domestic international arbitration following two cases from Singapore. (See (i) *Astro Nusantara International BV and others v. PT Ayunda Prima Mitra and others* [2012] SGHC 212; (ii) *FT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372; [2013] SGCA 57 (Astro II)).

[62] In explaining the term "domestic international awards", Belinda Ang Saw Ean J in *Astro Nusantara International BV and others v. PT Ayunda Prima Mitra and others* [2012] SGHC 212, said:

> By the term "domestic international awards", I refer to international commercial arbitral awards made in the same territory as the forum in which recognition and enforcement is sought, eg, in the context of

A Singapore, these are arbitral awards rendered under the IAA and the Arbitration Rules of the Singapore International Arbitration Centre 2007 ("the SIAC Rules 2007" with Singapore as the seat of arbitration.

[63] We agree with the submission of counsel for JDN Group to the effect that when the Court of Appeal used the term "domestic international
B arbitration", it was for convenience and for illustrative purposes only to describe a type of international arbitration where one of the parties is a foreign party and the seat under the arbitration agreement was in Malaysia. When read in the proper context, it seems to us that it was nothing more than to distinguish three types of arbitral awards which the Court of Appeal
C viewed the Act recognises; one of them being international arbitration award arising from Malaysia which it later called "domestic international arbitration". The term "domestic international arbitration" is therefore merely a popular name used to distinguish the two types of "international arbitration", ie, (i) international arbitration, which has its seat in Malaysia
D and (ii) international arbitration, which is not seated in Malaysia and does not run foul of the Act.

[64] In the present case, as correctly submitted by learned counsel for the JDN Group, the point of law in dispute between the parties was fundamentally that of whether the arbitration is an international arbitration
E or a domestic arbitration. In this regard, the Court of Appeal had accepted that the said final award arose from an international arbitration within the meaning of s. 2 of the Act and on those grounds, allowed the preliminary objection raised by the JDN Group. In a way, the question posed is unrelated to the rival contentions of the parties in the courts below.

F **Conclusion**

[65] In consequence, in the circumstances of this case, we are of the opinion that there is no real necessity to answer question 1; answering it would not affect the position of the parties or would have any bearing in the outcome of this appeal. We would prefer to leave the resolution of question
G 1 to a case where the question must necessarily be determined.

[66] As indicated earlier, our answer to question 2 is in the negative.

[67] In view of the conclusion that we have reached with regard to the two questions of law, the result therefore is that the s. 42 appeal fails and must
H be dismissed with costs.

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